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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~No. 1863~~ 70-318

JAMES A. HARRIS, JR., RALPH I. KNOWLES, ANNE SMITH, ROBERT SMITH, and WALTER GOMEL, suing individually and on behalf of others similarly situated,

Petitioners,

— *vs.* —

W. D. SAMUELS, JR., individually and as Chairman of the Tuscaloosa County Board of Registrars; JERRI RICHARDSON and ESTELLE HANSFORD, individually and as members of the Tuscaloosa County Board of Registrars; and the TUSCALOOSA COUNTY BOARD OF REGISTRARS,

Respondents,

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respectfully Submitted,

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CONTENTS

Table of Cases and Authorities iii

Opinions Below 1

Jurisdiction 2

Constitutional Provisions and Statutes Involved 2

Questions Presented 3

Statement of the Case 3

A. The Procedure Below 3

B. The Facts of the Case 7

Argument 10

I. WHETHER WRIT OF CERTIORARI SHOULD BE GRANTED WHERE CIRCUIT COURT OF APPEALS APPLIED THE "DOCTRINE OF ABSTENTION" IN A CASE WHERE THERE WAS NO CHALLENGE, CONSTITUTIONALLY OR OTHERWISE, TO A STATE STATUTE ON ITS FACE, BUT MERELY A CHALLENGE TO THE INTERPRETATION THEREOF; WHERE NO INTERPRETATION BY THE STATE COURTS WAS SOUGHT BY PETITIONERS AND WHERE STATE COURTS HAVE NO CONSTRUED SAID STATUTE AS IT APPLIES TO PETITIONERS 10

II. WHETHER A WRIT OF CERTIORARI SHOULD BE GRANTED WHEN BASIS THEREFOR UNDER THE CRITERIA SET FORTH IN RULE 19 OF THE SUPREME COURT RULES IS TOTALLY LACKING 21

Conclusion 24

Appendix

Temporary injunction of the district court, October 16, 1968 ..... 1a
Judgment of the district court, February 9, 1970 ..... 3a
Judge Lynne's findings of facts and conclusion of law, February 6, 1970 ..... 4a
Opinion of the United States Court of Appeals for the Fifth Circuit, March 16, 1971 ..... 8a
Judgment of the United States Court of Appeals for the Fifth Circuit, March 16, 1971 ..... 18a
Order denying rehearing by the United States Court of Appeals for the Fifth Circuit, April 7, 1971 ..... 19a
Order staying mandate for sixty days of the United States Court of Appeals for the Fifth Circuit, April 23, 1971 ..... 20a
28 USC-Supreme Court Rules—Rule 19-1(b) 21a
Title 17 Code of Alabama 1940 (Recomp. 1958) § 12 ..... 21a
Title 17 Code of Alabama 1940 (Recomp. 1958) § 17 ..... 22a
Title 17 Code of Alabama 1940 (Recomp. 1958) § 31 ..... 22a
Title 17 Code of Alabama 1940 (Recomp. 1958) § 33 ..... 22a
Title 17 Code of Alabama 1940 (Recomp. 1958) § 34 ..... 23a
Title 17 Code of Alabama 1940 (Recomp. 1958) § 35 ..... 23a
Title 17 Code of Alabama 1940 (Recomp. 1958) § 64-16(a) 24a
Title 17 Code of Alabama 1940 (Recomp. 1958) § 64 (23) 24a

TABLE OF CASES AND AUTHORITIES

Cases:

Allgood v. Williams 92 Ala. 551, 8 So. 2d 722 (1890) 12

Ambrose v. Vanderford 277 Ala. 66, 69, 169 So. 2d 149, 152 (1964) 12

Askew v. Hargrave 28 L.Ed. 2d 196, 199 19

Baggett v. Bullitt 277 U.S. 360 (1964) 16

Bragg v. State 69 Ala. 204 (1881) 13

Caheen v. Caheen 233 Ala. 494, 172 So. 618 (1937) .. 13

Cantwell v. Conn. 310 U.S. 296 (1940) 16

Carrington v. Rash 308 U.S. 89, 91 (1965) 17, 20

Cipriana v. City of Houma 395 U.S. 70 (1969) 19

Clary v. Sanders 43 Ala. 287 13

Edwards v. Sammons 437 F.2d 1240 (1971) 16, 19

Evans v. Corman 398 U.S. 419 (1970) 20

Ex Parte Bullen 236 Ala. 56, 181 So. 498 12

Ex Parte Davis 249 Ala. 221, 30 So. 2d 648 (1947) .. 13

Ex Parte Phillips 275 Ala. 80, 152 So. 2d 144 (1963) 12

Ex Parte State ex rel Altman 237 Ala. 642, 188 So. 685 (1939) 13

Ex Parte Weissinger 247 Ala. 113, 22 So. 2d 510 .. 13, 14

Frederick v. Wilbourne 198 Ala. 137, 73 S. 442 13

Gaston Co. v. U.S. 395 U.S. 285 21

Glover v. Glover 18 Ala. 367 (1850) 13

Griffin v. School Board of Prince Edward County 377 U.S. 218 (1964) 17

Griffin v. Wall 32 Ala. 149 13

Harmon v. Forssenius 380 U.S. 528 (1965) 16

Harrison v. N.A.A.C.P. 360 U.S. 167 ..... 17, 19, 20

Holmes v. Holmes 212 Ala. 597, 103 So. 884 13

Huchaher v. State 168 Ala. 27, 53 So. 25 13

In Re Hoffman 187 Misc. 799, 65 NYS 2d. 107, 111 (Sup. Ct. 1946) 12

In Re Liberman 44 F. 2d 661 (D.C.S.D. Ala. 1930) 13

Kegley v. Johnson 207 Va. 54, 147 SE 2d 735 (1966) 12

Kramer v. Union Free School District 395 U.S. 621 (1965) 17, 19, 20

Lassiter v. No. Hampton Election Board 360 U.S. 45, 3 L.Ed. 2d 1072-79, SC 985 17

Lucky v. Roberts 211 Ala. 598, 100 So. 878 (1924) .. 13

Mason v. Missouri 179 U.S. 328, 335, 45 L.Ed. 214, 220, 21 SC 125 17

McDonald v. Bd. of Electors Comm. 394 U.S. 802 20

McLeod v. Adams 218 Ala. 424, 118 So. 636 (1928) 13

McNeese v. Bd. of Education 373 U.S. 668 (1963) .. 16

Mitchell v. Kinney 242 Ala. 196, 50 So. 2d 788, 242 ALR 196 ..... 12, 13

N.A.A.C.P. v. Button 371 U.S. 415 (1963) 17, 21

Cf Nelson v. George 16 L.Ed 2d 578, 580 18

Opinion of the Justices, 40 So. 2d 849, 856 18

Pierce v. Louisiana 306 U.S. 354 21

Pope v. Howle Ala. 149 S. 222 13

Pope v. Williams 193 U.S. 621, 48 L.Ed. 817, 822, 24 SC 573 17

Railroad Commission of Texas v. Pullman Co. 312 U.S. 496 21

Reetza v. Bozanich 397 U.S. 82 (1970) 19

Rescue Army v. Municipal Court 331 U.S. 549 (1947) 21

Richardson v. Richardson 258 Ala. 423, 63 So. 2d 364 (1953) 13

State ex rel Spence 18 Ala. 806 13

State of Texas v. Florida 30 U.S. 398 (1939) 13

U.S. v. Petrillo 332 U.S. 1 (1947) 21

Wesberry v. Sanders 376 U.S. 1 20

Zwickler v. Koota 389 U.S. 241 (1967) 16

Other:

Restatement of Conflict of Laws § 9, comment (e) at 20 (1934) 12

Constitution of the United States

First Amendment 2

Fourteenth Amendment 2

Statutes

28 USC 1254(1) 2

28 USC, Supreme Court Rules,
Rules 19-1(b) 2, 3, 21a, 24

Title 17 Code of Alabama 1940 (1958)
§ 12 ..... 2, 21a

Title 17 Code of Alabama 1940 (1958)
§ 17 ..... 3, 11, 14, 16, 17, 22, 22a

Title 17 Code of Alabama 1940 (1958)
§ 31 ..... 3, 9, 15, 22a

Title 17 Code of Alabama 1940 (1958)
§ 33 ..... 3, 9, 22a

Title 17 Code of Alabama 1940 (1958)
§ 34 ..... 3, 23a

Title 17 Code of Alabama 1940 (1958)
§ 35 ..... 3, 16, 18, 23a

Title 17 Code of Alabama 1940 (1958)
§ 64-(16a) 3, 14, 17, 24a

Title 17 Code of Alabama 1940 (1958)
§ 64(23) 3, 14, 17, 24a

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Petitioners,

— *vs.* —

W. D. SAMUELS, JR., individually and as Chairman of the Tuscaloosa County Board of Registrars; JERRI RICHARDSON and ESTELLE HANSFORD, individually and as members of the Tuscaloosa County Board of Registrars; and the TUSCALOOSA COUNTY BOARD OF REGISTRARS,

Respondents,

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The Petitioners, by way of an appendix, set forth the temporary injunction; the judgment of the District Court (without the findings of fact and conclusions of law); the opinion of the Court of Appeals, the judgment of the Court of Appeals, the order denying the re-hearing by the Court of Appeals and the order of the Court of Appeals staying its mandate. In order that the Court may have a clearer picture of the facts, Respondents additionally append the findings of fact and conclusions of law of the District Court of February 9, 1970 (less the memorandum of Robert L. Potts attached thereto). Appendix pp 4a-7a. It is the under-

standing of the Respondents that the entire record below has been certified to the Court and those items not appended are available to the Court.

JURISDICTION

The Petitioners cite the jurisdiction of the Court as being founded upon 28 USC 1254 (1). This section does in fact set forth methods by which a decision of the Court of Appeals may be reviewed and certainly certiorari is one method, but section 1254 appears to be procedural, rather than substantive. In saying this, Respondents are not questioning the comprehensive and unlimited power of the Court to review decisions of the Court of Appeals by certiorari; but, no substantive section of the Constitution or of any statute is presented to the Court for a basis of jurisdiction, nor have the Petitioners laid any foundation within Rule 19 of the Supreme Court Rules, which sets forth the fact that a review on writ of certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents see no application of Amendment I to the Constitution of the United States set forth in Petitioners' brief and, as presented, Petitioners show no circumstances which involve the violation of Amendment XIV to the Constitution of the United States. Amendments I and XIV, as aforesaid, are herein cited only for purposes of replication. The pertinent portions of other statutes and rules applicable to this case are set forth in the appendix of this brief and are as follows: 28 USC, Supreme Court Rules, Rule 19-1(b) page 21a; Title 17 *Code of Alabama 1940* (Recomp. 1958),

Section 12, page 21a-22a; Section 17, page 22a; Section 31, page 22a; Section 33, page 22a-23a; Section 35, page 23a; Section 64 (16-a and 23), page 24a.

QUESTIONS PRESENTED

Whether writ of certiorari should be granted where Circuit Court of Appeals applied the "Doctrine of Abstention" in a case where there was no challenge, constitutionally or otherwise, to a state statute on its face, but merely a challenge to the interpretation thereof; where no interpretation by the State Courts was sought by Petitioners and where State Courts have not construed said statute as it applies to Petitioners.

Whether a writ of certiorari should be granted when basis therefor under the criteria set forth in Rule 19 of the *Supreme Court Rules* is totally lacking.

STATEMENT OF THE CASE

A. The Procedure Below

While we do not necessarily agree with the jurisdictional authorities cited for the bringing of the action by Petitioners in the United States District Court, nevertheless, an action was brought on the 14th day of October, 1968, alleging in substance that the Petitioners, during the month of October, 1968, had attempted to register to vote in Tuscaloosa County, Alabama, and had been refused registration on the sole basis they were students at the University of Ala-

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In order to avoid confusion, Respondents adopt the following designations to individual portions of the record: "HT" will indicate the transcript of the hearing on Motion for Preliminary Injunction; "DEP" will indicate the deposition of Mr. Samuels; "TT" will indicate the trial transcript; "O" will indicate the opinion of the District Court; "M" will indicate the memorandum of Mr. Potts and "PI" will indicate the findings on conclusions of the Court on Motion for Preliminary Injunction and "I" indicates the Preliminary Injunction Order.

bama, although each of them were willing to sign an oath that their intent was to reside indefinitely in Tuscaloosa County, Alabama. Petitioners further alleged that the Board of Registrars had in the past registered many students of the University of Alabama who were willing to sign such an oath as Petitioners were willing to sign. Said action was brought by these Petitioners, individually and as a class action, for all those similarly situated, praying that they be allowed to register and that the Board be enjoined from denying persons to register to vote in Tuscaloosa County, Alabama, solely because they were students.

Respondents were served with the petition, though lacking a summons, on the 15th day of October, 1968, and only by inquiry to the Court at 4 p.m. were the Respondents aware that a hearing would be held the following morning at 9 o'clock in Birmingham, some 60 miles distance. After Respondents' written motion to quash service of process and oral motions for a continuance and for abstention by the federal courts, all of which were summarily overruled, a hearing of less than an hour was held and a preliminary injunction was issued which read in part as follows:

> "That the Defendants, W. D. Samuels, Jr., individually and as chairman of the Tuscaloosa County Board of Registrars; Jerri Richardson and Estelle Hansford, individually and as members of the Tuscaloosa County Board of Registrars; . . . . be and each of them is hereby enjoined from denying registration to any applicant, where the statutory period of residence and *other requirements have been met*, solely because the applicant is a student or the spouse of a student, when the applicant will sign a sworn statement that the applicant presently intends to remain in Tuscaloosa County permanently or for an indefinite period after completing of applicant's study

at the University or after his or her spouse completes his or her study there and does not intend and will not vote in another county within or without the state, in addition to Tuscaloosa County." (Emphasis added)

Subsequent to the issuance of this injunction defendants again attempted to deny registration to certain students who, in the opinion of the Board, were not bona fide "residents" of Tuscaloosa County, Alabama, and who showed nothing to support their contention of residence other than their bare statement. The Board placing the interpretation on the "other requirements" clause of the injunction that the only other requirement could be that of domicilary status. A Rule to Show Cause was requested by plaintiffs and an order which would have held defendants in contempt was issued on November 4, 1968. It was agreed between the parties, under the scrutiny of the court, that the rule to show cause would be dismissed, and that all students who had been physically present in Tuscaloosa County for the requisite statutory periods, and willing to sign an oath stating that they intended to reside in Tuscaloosa County, Alabama, permanently or for an indefinite period of time, would be registered until this cause could be tried on its merits. (M Exhibit B p2)

Respondents' written plea for abstention, contained in their answer, was summarily dismissed at pretrial. On May 28 and 29, 1969, trial of the case on the merits was had at Tuscaloosa, with the Honorable Seybourn Lynne presiding. Whether the Honorable Seybourn Lynne heard this case on its merits, due to the retirement of Judge Grooms, as stated in Petitioners' brief, or because it was merely one of the several cases on the Western Division docket, which was handled by Judge Lynne, is unknown to counsel for

Respondents, but having practiced for a number of years in the Northern District of Alabama, the latter would seem more reasonable than the former. Further, the inference obviously drawn from this statement that Judge Grooms would have decided the case differently is presumptious to say the least.

On February 9, 1970, Judge Lynne rendered his decision dismissing the claim of the Plaintiffs on its merits, the counterclaim of the Respondents and dissolving the temporary injunction previously issued by the Court. (O 1-4; Appendix pp 3a)

Judge Lynne, in his finding of facts, found it was the policy of the Respondents to register students who were, in their opinion, bona fide residents or domiciliaries of Tuscaloosa County; that the Board did not deny student voter applications for the single reason that the applicants were students but consistently required some evidence to support a mere statement of intent, from which evidence it could be inferred that the student applicant intended to reside in Tuscaloosa County permanently or for an indefinite period of time; and, that the Board prior to this action being instituted, even handedly and indiscriminately applied certain standards in determining whether students would be registered and that the Board registered more students in equivalent periods preceding the injunction than subsequent thereto (for full text of Judge Lynne's finding of facts, see appendix pages 4a-7a).

Subsequently, on appeal to the United States Court of Appeals for the Fifth Circuit, that Court held, on March 16, 1971, that the District Court had erred in holding trial on the merits and that it should have abstained from deciding the issue until State Courts had authoritatively construed the state statute or until

efforts to obtain such adjudication had been exhausted. (See appendix page 18a)

On April 7, 1971, the United States Court of Appeals for the Fifth Circuit denied a petition for rehearing and Petitioners filed the pending petition for writ of certiorari.

FACTS OF THE CASE

Respondents do not agree with the statement of facts of the case as set forth on pages 5 through 7 of the Petitioners' brief, especially the description of the status of the Petitioners, and Respondents feel the same is more correctly stated as follows:

The Petitioners, James A. Harris, Jr., Ralph I. Knowles, Robert Smith and Walter Gomel, were, at the time of the filing of the original complaint in the Court below, students at the University of Alabama, and the Petitioner, Anne Smith, was the wife of Petitioner Robert Smith.

The Petitioner, James A. Harris, came to Tuscaloosa from Jefferson County, Alabama, to attend the University of Alabama. During his studies at the University, he had actually registered to vote in his home county of Jefferson, not more than two years prior to his application to register in Tuscaloosa County. At the time of his application, Mr. Harris had applied for a number of positions, one of which was in Tuscaloosa County, and stated to the Board that his future would depend upon the acceptance of one of these positions. After the filing of this case, but prior to the trial on the merits, Mr. Harris accepted a position in Tuscaloosa County. (TT 107-110)

The Petitioner, Ralph I. Knowles, at the time of his application, was a student at the University of Alabama, having come to Tuscaloosa from Huntsville, Alabama, and was, at the time of his application, a registered voter in Madison County, Alabama, single, living in a dormitory and working part-time for the University of Alabama. Mr. Knowles, though questioned at length, offered no evidence of his intent to remain in Tuscaloosa as a citizen other than offering to sign a statement that he intended to reside in Tuscaloosa. Mr. Knowles was denied registration because he was not a domicillary resident of Tuscaloosa County, Alabama. (TT 18, 38-39) Mr. Knowles, upon his graduation, accepted a position teaching in Morgan County, Alabama.

The Petitioner, Walter Gomel came to the University of Alabama from Noxubee County, Mississippi, and, at the time of his application to register in Tuscaloosa County, Alabama, was a registered voter in Noxubee County, Mississippi. Mr. Gomel gave no evidence of his intent to reside in Tuscaloosa County, Alabama, other than his bare statement that he intended to reside in the County. Mr. Gomel further listed his home address at Macon, Mississippi and was, at the time, residing in student housing. (Application of Walter Gomel Defendant's Exhibit 3, TT 32-33)

The Petitioner, Robert Smith and Petitioner, Anne Smith, are husband and wife. Mr. Smith, at the time of his application, was a student and a registered voter in Mobile County, Alabama. Mrs. Smith was a teacher in the Tuscaloosa School system. Both stated that their future residency depended upon the employment of Mr. Smith after graduation. Mr. Smith, less than three months after the filing of the complaint in District Court, accepted a position with the Mobile, Alabama

school system and he and Mrs. Smith removed themselves to Mobile County in May of 1969. Mr. and Mrs. Smith were refused registration on the basis that they were residents of Mobile County. (TT 123-131, 45-46; Application of Mr. and Mrs. Smith Defendants' Exhibit 3)

All of the above became registered voters in Tuscaloosa County, Alabama, pursuant to the preliminary injunction and subsequent agreement of the parties and still are such registered voters except for those who requested transfer to other counties.

The Respondents, W. D. Samuels, Jr., Jerri Richardson and Estelle Hansford, compose the Tuscaloosa County Board of Registrars with W. D. Samuels, Jr. being the Chairman. The Board is charged with the duty of registering voters in Tuscaloosa County, Alabama, pursuant to the provisions of Title 17, *Code of Alabama*, 1940 (Recomp. 1958), and are authorized to take testimony touching the qualifications of applicants for voter registration and to judicially determine if said applicants met the qualifications to register to vote in Tuscaloosa County, Alabama. (T 17 Section 31 and 33 Code of Ala.)

The Board of Registrars has never had a policy of denying voter applications merely because the applicants were students but has even handedly and indiscriminately attempted to determine which applicants were residents of Tuscaloosa County and which were not; registering those who were and rejecting those who were not. (TT 11-18, 73-74)

The Board of Registrars, in equivalent periods of time, registered more student applicants prior to being placed under an injunction than subsequent thereto, all of which is borne out by the evidence and the finding of

facts of the Honorable Seybourn Lynne. (O 3, TT 22-25)

The Doctrine of Abstention was first raised orally on the hearing of a petition for a preliminary injunction held the 15th day of October, 1968, and was subsequently raised in the written answer of the Respondents, as is set forth on page 7 of Petitioners' brief, but such contentions were summarily dismissed.

Abstention was not raised by either party before the Fifth Circuit Court of Appeals for obvious reasons, the Respondents' position being that while perhaps the District Court should have abstained, it was emminently correct in its decision on the merits and should be affirmed; and the Petitioners' position being that it had sought the Federal remedy in the beginning and that the District Court was in error on the merits and should be reversed. The position of both parties appears to be the same to this day.

ARGUMENT

I.

WHETHER WRIT OF CERTIORARI SHOULD BE GRANTED WHERE CIRCUIT COURT OF APPEALS APPLIED THE "DOCTRINE OF ABSTENTION" IN A CASE WHERE THERE WAS NO CHALLENGE, CONSTITUTIONALLY OR OTHERWISE, TO A STATE STATUTE ON ITS FACE, BUT MERELY A CHALLENGE TO THE INTERPRETATION THEREOF; WHERE NO INTERPRETATION BY THE STATE COURTS WAS SOUGHT BY PETITIONERS AND WHERE STATE COURTS HAVE NOT CONSTRUED SAID STATUTE AS IT APPLIES TO PETITIONERS.

The Petitioners, by the issues presented, raise the questions of whether or not the application of the "doctrine of abstention" by the Fifth Circuit Court of

Appeals was proper and whether or not the District Court was correct in proceeding to a trial on the merits. These are valid questions and deserve reply, but first we must be sure we are talking about the same case.

On Page 8 of the Petitioners' brief in a bold heading, and the paragraph following, the assumption is made, that millions are being disenfranchised.

Firstly, it is our understanding that the case at bar involves an Alabama statute governing the registration of student voters, and more particularly, the registration of such voters in Tuscaloosa County, Alabama, in which case the undisputed evidence shows that more students were registered in comparable periods of time under procedure used by Respondents prior to suit than subsequent thereto when Respondents were under a highly publicized injunction requiring only the making of an oath by those physically present for the statutory period to register. Figures for these comparable times are as follows:

Jan. 1966 to May 1966 — 101*
Nov. 1966 to May 1967 — 35
Nov. 1967 to May 1968 — 120
Nov. 1968 to May 1969 — 29 (TT 22-25, O 3)

These figures represent the registration of students attending the University of Alabama and Stillman Institute, which combined constitute one of the largest, if not the largest, concentrations of students in the state. Where are the millions?

Secondly, the allegation of disenfranchisement is just not correct. Title 17, Section 17, Supra, reads in part as follows:

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* Preliminary injunction was in effect prior to trial in District Court (November 68 - May 69). Other periods show registration by Respondent Board in previous years.

"No person shall lose or acquire a residence . . . by being a student of an institution of learning,". . . The statute is a two edged sword. It first protects the right of the student to vote at the place of his residence prior to becoming a student and then places a restriction on his acquisition of a new residence at the situs of the educational institution. This restriction being, that if the student's intent is to be a student and not to make a home then he does not acquire a residence for voting purposes. A student may do both, be a student and acquire a residence, at the situs of the institution of learning, but this takes more than being present as a student and stating the intent to remain. He must have the intent and the same must be manifested by conduct as well as by declarations. "Residence" or "resided", as used in connection with voting, are equivalent to the term "domicile". *Mitchell v. Kinney* 242 Ala. 196, 50 So 2d 788, 242 ALR 196; *Allgood v. Williams* 92 Ala. 551, 8 So 722 (1890) *Ex Parte Bullen* 236 Ala. 56, 181 So 498; *In Re Hoffman* 187 Misc. 799, 65 NYS 2d 107 111 (Sup. Ct. 1946); *Kegley v. Johnson* 207 Va 54 147 SE 2d 735 (1966); Restatement of Conflict of Laws Sec. 9, comment (e) at 20 (1934).

Brief study of the law of domicile reveals that there are three types of domicile: (1) domicile of origin, (2) domicile by operation of law, and (3) domicile of choice. While all three types may be pertinent to the issues of this case, the latter seems most relevant.

Domicile of choice has been defined by the Alabama courts as "a residence of choice at a particular place accompanied by an intent to remain there permanently or for an indefinite time." *Ambrose v. Vanderford*, 277 Ala. 66, 69, 167 So 2d 149, 152, (1964); *Ex Parte Phillips*, 275 Ala. 80, 152 So. 2d 144, (1963).

It would seem then that the fact that one is present in an apartment, a house, or a dormitory in Tuscaloosa is not enough; the question is the intent accompanying his presence, and in order to determine one's intent in this situation resort may be made to both conduct and declarations. *Mitchell v. Kinney,* supra; *Holmes v. Holmes* 212 Ala. 597, 103 So 884.

A person coming to Tuscaloosa from another county or state as a student, or otherwise, has a home, habitation, or domicile and this original or former domicile is presumed under the law of Alabama to continue until a new one has been acquired in fact and in intent. *Ex Parte Davis,* 249 Ala 221, 30 So. 2d 648 (1947); *Ex Parte Weissinger,* 247 Ala. 113, 22 So. 2d. 510, *Ex Parte State ex rel Altman* 237 Ala. 642, 188 So. 685(1939); *Caheen v. Caheen,* 233 Ala. 494, 172 So. 618, 1937); *In re Liberman,* 44 F. 2d 661 (D.C.S.D. Ala. 1930). And nothing short of an unequivocal and affirmative establishment of a new domicile is effective to lose his original and established domiciliary status. *Pope v. Howle,* Ala. 149 So. 222; *Frederick v. Wilbourne* 198 Ala. 13 7,73 So. 442; *Lucky v. Roberts* 211 Ala. 578, 100 So. 878 (1924); *Holmes v. Holmes,* supra; *Huchaher v. State* 168 Ala. 27, 53 So. 25; *Clary v. Sanders* 43 Ala. 287; *Griffin v. Wall* 32 Ala. 149; *State ex rel Spence,* 18 Ala. 806. Furthermore, one asserting a change of domicile has the burden of establishing it. *Richardson v. Richardson,* 258 Ala. 423, 63 So 2d 364 (1953); *Ex Parte Weissinger,* supra; *Mitchell v. Kinney,* supra; *State of Texas v. Florida,* 30 U. S. 398 (1939); *Caheen v. Caheen,* supra; *McLeod v. Adams,* 218 Ala. 424, 118 So. 636 (1928); *Bragg v. State* 69 Ala. 204, (1881); *Glover v. Glover,* 18 Ala. 367 (1850); and when facts are conflicting, the presumption strongly favors the original or former

domicile as against an acquired one. *Ex parte Weissinger*, supra.

But, let us assume that the student cannot establish a residence in Tuscaloosa County which will enable him to vote there; he is not disenfranchised; he simply uses the other side of the "sword" (Title 17 Section 17) and votes absentee in the county from whence he came under very simple procedures set forth in the statutes, the pertinent portions of which are as follows:

> Title 17, Section 64 (16) *Code of Alabama*, 1940 (Recompiled 1958) "Any qualified elector of this state who is . . . absent from the county because of his attendance at any university or college at which he is duly enrolled outside the county; or any qualified elector who is the spouse of such elector and at the time of voting actually resides with such elector, may vote in the election in the manner and under the regulations hereinafter prescribed."
>
> Title 17, Section 64 (23) *Code of Alabama*, 1940 (Recompiled 1958) "Any qualified elector who is absent from the county because of his attendance at any university or college at which he is duly enrolled outside the county, or any qualified elector who is the spouse of such elector and at the time of voting actually resides with such elector, may, not more than forty-five nor less than five days before the election at which he desires to vote, make written application to the register, or to the person designated to serve instead of the register, for an absentee ballot. Such application shall contain or have attached thereto a statement signed by the registrar of the university or college, or his qualified assistant, stating that such person is duly enrolled at such institution, or is the spouse of such person so enrolled at such institution. The voter may make the affidavit on the ballot before any

officer authorized to administer oaths or before any officer of the university or college, and mail the ballot to the register or other person acting instead. Such ballot shall be handled and counted in the same manner as ballots voted before the register in person."

Thus, the question in this case is not whether or not a student can vote, the question is where can he vote. Where are those disenfranchised?

Thirdly, the District Court found that there was no discrimination by Respondents in the registration of student applicants. (O 1-4) Again, where are those disenfranchised?

Fourthly, no issue was raised nor evidence presented concerning the law or practice of other states in the registration and voting of students. Matters not disclosed in the evidence are non-existant for purposes of review, and, assumed situations and circumstances should not be considered *A. P. v N. L. R. B.*, 301 U.S. 103.

In turning to the matter of "abstention", it was raised orally at the hearing on preliminary injunction and it was raised in the Respondent's written answer prior to trial and both times summarily overruled. It was not raised by either party on appeal for obvious reasons.

Was "Abstention" proper? The only answer can be in the affirmative. The state statutes set forth precise rules for the determination of Petitioners' rights. Under Title 17, Section 31, *Code of Alabama*, 1940 (Recompiled 1958) the Board of Registrars is charged with the duty of examining applicants and judicially determining their qualifications. If denied, applicants have the statutory right to appeal to the Circuit Court and demanded a jury, if desired, and, in the event of

denial there, appeal to the Supreme Court of Alabama, Title 17, Section 35, *Code of Alabama.* (The same statute denies the right of appeal to the Board or State.) And, in the event of denial there, this Court could review the final state product; but petitioners chose not to follow the above procedure, ceased thir state efforts at the initial step and asked the Federal Courts to construe the state statute.

There has been no constitutional attack of Title 17, Section 17, or any other statute. The Petitioners restricted the gravamen of their contention to a claim that the Respondents illegally or wrongfully construed the same as it related to them.

The question of whether or not one is a "resident" or a "citizen" of a particular locality as to enable him to register to vote is by its very nature a question of individual facts and circumstances to which the law is to be applied. The very essence of the Petitioners' attack is the alleged wrongful application of an unchallenged state law. Yet, they have not sought a definite state application of the same by resort to the Courts. If the challenge in this case was to the constitutionality of the statute, and the same was clearly not subject to any interpretation as to avoid the constitutional question as in *Zwickler v. Koota* 389, U. S. 241 (1967); *Harmon v. Forssenius* 380 U. S. 528 (1965); *Edwards v. Sammons* 437 F² 1240 (1971); or if the same were so vague as to not be subject to interpretation as to avoid or alter the constitutional question presented as in *Baggett v. Bullitt* 277, U. S. 360 (1964); *Cantwell v. Conn.* 310 U. S. 296 (1940); or if the same arose out of actions, in violation of the Civil Rights Acts or other acts where the origin and the remedy is purely federal in nature, as in *McNeese v. Board of Education* 373 U. S. 668 (1963); or if a state court ruling had been

sought and there had been a definite ruling, or at least an opportunity to do so as in *Griffin v. School Board of Prince Edward County* 377 U. S. 218 (1964); *N.A.A.C.P. v. Button* 371 U. S. 415 (1963); then the application of the doctrine of abstention might be improper, but such is not the case at bar. Title 17, Section 17, Supra is fairly open to state court interpretation which could obviate or substantially alter any constitutional or federal question presented. *Harrison v. NAACP* 360 U. S. 167. The question is not one which is purely federal in origin and remedy. The question here, is not whether students are allowed to vote, the question is where they will vote. For those not residents of Tuscaloosa County, Alabama, the ballot is as close as the nearest mail box. Title 17, Section 63 (16a & 23). *Code of Alabama* 1940 (Recompiled 1958).

It has long been recognized that states have the power to impose reasonable citizenship and residency requirement on the availability of the ballot. *Carrington v. Rash* 308 U. S. 89, 91 (1965); *Kramer v. Union Free School District* 395 U. S. 621 (1965); *Lassiter vs. North Hampton Election Board* 360 U. S. 45; 3 L.Ed. 2nd 1072-79; SC 985; *Pope V. Williams* 193 US 621, 48 L. Ed. 817, 822, 24 SC 573; *Mason v. Missouri* 179 US 328, 335, 45 L. Ed. 214, 220, 21 SC 125.

Moreover, in *Carrington*, the court cited Title 17, Section 17 with apparent approval. Again we reinterate that there has been no challenge, constitutional or otherwise, to Title 17, Section 17, on its face, and Petitioners had open to them well defined state remedies and procedures whereby they could have raised any valid federal constitutional issues which, if resolved against them by the state courts, would have been sufficient to invoke the jurisdiction of this Court.

The abstention doctrine is simply recognition by the

federal judiciary that ordinarily, in respect to the interpretation of state laws, state remedies are to be exhausted before resort to federal procedures. (*Cf Nelson v. George*, 16 L.Ed. 2d 578, 580)

We emphasize that Respondent Board has been authoritatively held by the Alabama Supreme Court to be a judicial authority.

> "So that we have here a board having the qualities of a court for the purpose of judicially determining the qualifications of applicants to register." Opinion of the Justices, 40 So. 2d 849, 856.

From this judicial authority of original jurisdiction, a right of appeal exists in favor of a rejected applicant, but neither the Board nor the State can appeal. (Title 17, Section 35, Alabama Code)

In this case Petitioners initiated a state judicial proceeding in filing their applications to register; and this state proceeding was pending when Petitioners sought injunctive relief in the District Court and deliberatedly refused to follow state appellate procedures and *speculated* on federal court intrusion into a state controversy. The Court of Appeals recognized this, and dealt appropriately with the situation by denying to petitioners the right to benefit from their "speculation" with the courts and their neglect or failure to attempt a vindication of their alleged rights by available state remedies.

As recognized by the Court of Appeals in ordering abstention, it is clear that any federal constitutional question might be mooted or avoided by a state court construction. The state statute in question does not impinge upon establishment of a voting residence or domicile by a student. This being true, the propriety of

abstention as expressed by Judge Bell in *Edwards v. Sammons*, 437 F. 2d 1240 (1971), is applicable; and such principle, as forcibly stated in *Reetza v. Bozanich*, 397 U. S. 82 (1970), is most apropos in the case at bar, reference being to this Court's statement, per Mr. Justice Douglas, that controversies involving state law, even though enmeshed with federal questions, should await settlement by state tribunals. See also the later case of *Askew v. Hargrave* 28 L. Ed. 2d 196, 199.

By analogy, the case of *Harrison v. NAACP*, supra, is very apropos in this situation. In *Harrison*, there was an attack on five Virginia statutes in federal court without allowing the Virginia courts a reasonable opportunity to construe them, which construction might have avoided in whole or in part the necessity of a federal constitutional adjudication, or at least might have materially changed the nature of the problem and allowed the federal judgment to be based on the complete product of the state. In the instant case the Petitioners instigated the state process by application to the Board of Registrars but then abandoned the same without allowing the state to present its complete product.

We agree, as is stated on page 10 of Petitioners' brief, that the right to vote is fundamental. We further agree that if as in *Kramer*, supra, or *Cipriano v. City of Houma*, 395 U. S. 701 (1969), a portion of the electorate were being excluded then the Board would be required to show a "compelling state interest"; but the question here has not reached that stage. The instant case presents the question of who is a citizen and who is not, not a distinction between people all recognize as citizens. It is the duty of the Board to register those who are citizens of Tuscaloosa County and to exclude those who are not. The question here is not which citizens and electors shall vote but who are citizens and

who are not. In making such determination, the Board is applying a statute with a "reasonable and rational relationship to state ends." *McDonald v. Board of Electors Comm*, 394 U. S. 802.

If, in the instant case, a portion of the electorate was being excluded regardless of their residence and other qualifications as in *Carrington v. Rash*, supra, and in *Evans v. Corman*, 398 U. S. 419 (1970), the Respondents would agree that the states interest should be a "compelling" one, but this is not the case; there is no absolute exclusion of students nor is there the denial of ballot to those in a particular geographical area. The evidence shows the application of precise standards in determining the status of individuals as discussed in *Wesberry v. Sanders*, 376 U. S. 1; *Kramer*, supra; and *Carrington, supra.* We would further agree that a burden should not be placed upon the ballot, whether the same be economic, mental or physical, but nowhere in this case is it alleged or proven that these students are taxed, required to pass a test, or to do anything other than to answer simple questions to enable the Respondents to make a judgment as to whether or not the applicant is or is not a resident of Tuscaloosa County, under applicable state laws.

The position taken by the Petitioners, that the state (or in this case, the Board) rather than the applicant has the burden of demonstrating as to whether or not the applicant is a citizen is best answered by the statement of Judge Seybourn Lynne in his decision in this case when he said of this position: . . . "inherent in the mere statement of such contention is its apparent refutation". (O 4)

Further, the cases cited to support this contention are just not in point. Certainly it would be necessary, in a situation such as *Kramer*, supra, for the state to

show a "compelling interest" in order to differentiate between qualified electors, and in *Gaston Co. v. U.S.*, 395 U. S. 285, the very nature of the procedures and remedies sought under Federal Statutes placed the burden on the state; and in the case of *NAACP v. Button*, 371 U. S. 415 (1963) the statutes in question carried criminal sanctions, in which the burden always rests upon the state.

In the case at bar, the constitutionality of the statute is not in question, merely the interpretation and application thereof. The Court is being called upon, by Petitioners, to decide upon an alleged constitutional question, which decision would be unnecessary and premature, *Rescue Army v. Municipal Court* 331, U. S. 549 (1947); *U. S. v. Petrillo* 332 U. S. 1 (1947); *Pierce v. Louisiana* 306 U. S. 354; especially in view of the fact that there has been no state court interpretation of the statute, which is fairly open to an interpretation which could substantially alter or obviate any constitutional or federal question presented, *Railroad Commission of Texas v. Pullman Co.* 312 U. S. 496; *Harrison v. NAACP* 360 U. S. 167 (1941). And in view of the fact that the central question, here involved, is not whether students can vote in Alabama, but where they can vote, no one has been injured and no injury will be suffered in the time necessary to obtain a definitive state court decision. For these reasons the Writ requested should not be granted and the decision of the Court of Appeals should be allowed to stand.

II.

WHETHER A WRIT OF CERTIORARI SHOULD BE GRANTED WHEN BASIS THEREFOR UNDER THE CRITERIA SET FORTH IN RULE 19 OF THE SUPREME COURT RULES IS TOTALLY LACKING.

In measuring the merits of the petition for certiorari in this case against the considerations and criteria stated in Rule 19 of this Court, the ineptness of the petition is apparent.

The Petitioners as appellants and complainants below restricted the gravamen of their contention to a claim that the respondent, Board of Registrars, (hereinafter sometimes called the Board), illegally or wrongfully construed Section 17, Title 17, of the *Alabama Code* as it related to them. At no time in this litigation have petitioners taken the position that the statute is unconstitutional on its face. Section 17 is only a statutory recognition of the long known common law presumption that mere attendance at an institution of learning does not cause a loss of the student's home residence or citizenship, and conversely, is not the equivalent of citizenship for the purpose of suffrage at the geographical site of the educational institution. Respondents do not take the position, and have never taken the position, that one may not leave his home and acquire a residence for voting purposes at the situs of the educational institution, one certainly may; and the record shows the registration of more than 500 students in the 33 months immediately preceding the institution of this action in the District Court. (Defendant's Exhibit 7-10)

The Board's position stated simply is that one must be present in the county for the required statutory period, have the intent to make Tuscaloosa his home, and offer accompanying objective indicia of this intent.

Section 17, has been the *Alabama Code* without change, for more than 50 years, during which time there has been no ruling by the Alabama Appelate Courts in so far as the same applies to the situation at bar.

In the Courts below the Petitioners never complained of the constitutionality of the Alabama statute (for which reason abstention should apply), but the consistent thrust of their contention was directed merely to a factual application and interpretation of the Alabama law by an Alabama judicial authority concerning their respective individual situations. Basically, no federal question was involved. A fortiori, in this case, no federal question of substance undetermined by this Court is now involved.

Concerning the decision of the Fifth Circuit Court of Appeals in this case:

The decision does not involve any "special and important" reasons why this Court should order federal pre-emption of a state judicial responsibility for adjudging the legality of the State Board's interpretative action under State laws;

The decision is plainly not in conflict with another court of appeals decision on the matter of student residence being equivalent to domicilliary or suffrage residence; and none is cited by petitioners;

The decision is not an adjudication or decision of a controversy concerning state voting requirements in conflict with state law: To the contrary, the decision below rightfully attempts to avoid such judicial entaglement by abstaining from a decision of the alleged controversy until this state controversy can be determined by state courts; after which, and we state parenthetically, if there should remain an unresolved federal constitutional question or conflict then an appeal, to this Court might become applicable;

The decision is not one concerning a question of federal law which has not been, but should be, settled by this Court;

The decision is not one concerning a purely federal question conflicting with applicable decisions of this Court;

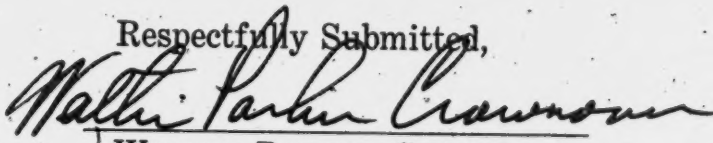
And, is not such a departure from precedent and accepted judicial proceedings as to justify an exercise of this Court's supervisory jurisdiction.

Pursuant to the standards of Rule 19, it is our earnest belief that this is simply not a proper case for issuance of a writ of certiorari. Citations of authority would simply belabor what is merely a factual situation. The required "considerations" for certiorari emerge only in the florid language of Petitioners' supplication.

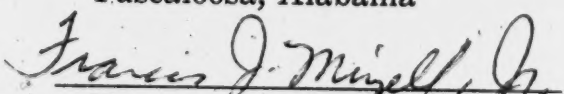
CONCLUSION

For the above reasons, Respondents respectfully request that the writ of certiorari requested by the Petitioners not be granted and that the decision of the Court of Appeals for the Fifth Circuit be allowed to stand.

Respectfully Submitted,



WALTER PARKER CROWNOVER
2011 8th Street
Tuscaloosa, Alabama



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APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION

JAMES A. HARRIS, JR., *et al.*, suing individually and on behalf of others similarly situated,
Plaintiffs

vs.

W. D. SAMUELS, JR., individually and as Chairman of the Tuscaloosa County Board of Registrars; *et al.*,
Defendants

CIVIL ACTION
No. 68-598

TEMPORARY INJUNCTION

Pursuant to the Findings of Fact and Conclusions of Law contemporaneously filed herewith;

It is ORDERED, ADJUDGED and DECREED as follows:

1. That the defendants, W. D. Samuels, Jr., individually and as Chairman of the Tuscaloosa County Board of Registrars; Jerri Richardson and Estelle Hansford, individually and as members of the Tuscaloosa County Board of Registrars; and the Tuscaloosa County Board of Registrars, and their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, who receive actual notice of this order by personal service or otherwise, be and each of them is hereby enjoined from denying

registration to any applicant, where the statutory period of residence and other requirements have been met, solely because the applicant is a student or the spouse of a student, when the applicant will sign a sworn statement that applicant presently intends to remain in Tuscaloosa County permanently or for an indefinite period after completing of applicants' studies at the University, or after his or her spouse completes his or her studies there, and does not intend and will not vote in another county within or without the state, in addition to Tuscaloosa County.

2. This injunctive order will become effective when the plaintiffs give security in the amount of $500.00 in accordance with and as conditioned by Rule 65(2)(c) of the Federal Rules of Civil Procedure.

Done and Ordered, this the 16th day of October, 1968.

H. H. GROOMS

United States District Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA,
WESTERN DIVISION

JAMES A. HARRIS, JR., *et. al.*
Plaintiffs

vs.

W. D. SAMUELS, JR., *et al.*,
Defendants

CIVIL ACTION
No. 68-598

In conformity with the Findings of Fact and Conclusions of Law contemporaneously entered herewith, it is ORDERED, ADJUDGED and DECREED by the court that plaintiffs are not entitled to the relief for which they pray; that the temporary injunction heretofore granted by this court on October 16, 1968, be and the same is hereby vacated and dissolved; that this action, including the counterclaim of defendants, be and the same is hereby dismissed; and that the costs of court incurred herein be and the same are hereby taxed against plaintiffs.

DONE this 9th day of February, 1970.

SEYBOURN H. LYNNE
Chief Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION

JAMES A. HARRIS, JR., *et. al.*
Plaintiffs

vs.

W. D. SAMUELS, JR., *et. al.*
Defendants

CIVIL ACTION
No. 68-598

This cause, coming on to be heard, was submitted for permanent injunctive relief upon the pleadings, the order on pretrial hearing, the proof, and the oral arguments and brief of counsel. After mature consideration the court enters herewith findings of critical facts, as to which there was conflicting evidence, and conclusions of law.

Findings of Fact

1. Prior to the filing of this suit the policy of the Board of Registrars of Tuscaloosa County, Alabama (the Board) was to register students who were, in the opinion of the Board, bona fide residents or domiciliaries of such county.

2. The Board has not denied student voter applications for the single reason that the applicants were students but has consistently required some evidence to support a mere statement of intent from which it might be inferred that the student applicant intended to reside in Tuscaloosa County permanently or for an indefinite period of time.

3. During the period from January, 1966, to October 14, 1968, more than 500 students were registered by the Board; other applications, as to which there is no record evidence, were rejected. During this period the Board indiscriminately and even handedly applied certain standards in determining whether students would be registered. After ascertaining that the student had or had not been a registered voter of another county or state, the Board uniformly proceeded as follows:

(a) The Board upon determining that an applicant was a student or a wife of a student attempted to determine by oral examination whether or not he or she had resided in the State, County and Precinct for a sufficient length of time to enable him or her to register.

(b) Then attempted to determine whether or not they would reside in Tuscaloosa County after the completion of his or her studies or the studies of her spouse, and accepted among other things as supporting evidence as his or her statement or of his or her intention to so remain, the following:

(1) Whether or not such applicant had attained a residence of Tuscaloosa County prior to his or her entry in school.

(2) Whether or not the applicant's parents resided in Tuscaloosa County.

(3) Whether or not after the student had come to Tuscaloosa as a student he or she had dropped from school for a sufficient period of time to acquire a residence.

(4) Whether or not such student owned property, a home or a business.

(5) Whether or not if employed, his employment was primary and school secondary.

(6) Whether or not such student had applied for and had been accepted for a position in Tuscaloosa upon graduation.

(7) Any other factor which tended to convince the Board of his or her intent to reside in Tuscaloosa either permanently or for an indefinite period of time.

(8) Further that in determining the eligibility of a male student, the Board did not consider the domicile of the wife, but rather gave to the wife the domicile of her husband, except in the case where the wife had been an established resident of Tuscaloosa County prior to her marriage.

4. Following the issuance of a temporary injunction by Judge Grooms on October 16, 1968, and a rule to show cause on November 4, 1968, it was agreed that until a final hearing on the merits the Board would register all students who had been physically present in Tuscaloosa County for the requisite statutory period and who would sign an oath that they intended to reside in Tuscaloosa County permanently or for an indefinite time. More students were registered in equivalent periods preceding such agreement than subsequent thereto.

Conclusions of Law

The court adopts the exceptional memorandum prepared by Robert L. Potts, Law Clerk, a copy of which is attached hereto, as its conclusions of law.

At the pretrial conference, Richard G. Singer, attorney for plaintiffs, candidly stated that the central issue in this case involved the incidence of the burden of proof. It was his contention that when a student established that he had been physically present in the county

for at least six months the burden of proof shifted to the Board to discredit his statement that he intended to reside therein permanently or for an indefinite period of time. The court was of the opinion then and is firmly convinced now that inherent in the mere statement of such contention is its apparent refutation.

Since the court concludes that the Board has not in the past denied and most likely will not in the future deny some or all students the right to register and vote in Tuscaloosa County merely because they are students, it follows that the plaintiffs are not entitled to the relief for which they pray; that the temporary injunction heretofore granted by this court should be dissolved, and that this action, including the counterclaim of defendants, should be dismissed.

DONE this 6th day of February, 1970.

SEYBOURN H. LYNNE

Chief Judge

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JAMES A. HARRIS, JR., *et al.*,
Plaintiffs-Appellants,

versus

W. D. SAMUELS, JR., *et al.*,
Defendants-Appellees.

No. 29683

Appeal from the United States District Court for the Northern District of Alabama.

(March 16, 1971)

Before RIVES, AINSWORTH and MORGAN, Circuit Judges.

RIVES, Circuit Judge: The plaintiffs Harris, Knowles, Robert Smith and Gomel are students at the University of Alabama in Tuscaloosa County, and the plaintiff Anne Smith is the wife of Robert Smith. They bring this action on behalf of themselves and as members of a class composed of students and spouses of students attending institutions of learning located in Tuscaloosa County, namely the University of Alabama

and Stillman College. The defendants are the Tuscaloosa County Board of Registrars and the three members of that Board.[1] The relief sought consists of preliminary and permanent injunctions requiring defendants to register plaintiffs and to refrain from denying residents the right to vote solely because they are students or the spouses of students. Federal jurisdiction is alleged under 28 U.S.C.A. §1331, §1343 and 42 U.S.C.A. §1983.

After a hearing Judge Grooms granted a temporary injunction which prevented the defendants

> "... from denying registration to any applicant, where the statutory period of residence and other requirements have been met, solely because the applicant is a student or the spouse of a student, when the applicant will sign a sworn statement that applicant presently intends to remain in Tuscaloosa County permanently or for an indefinite period after completing of applicant's studies at the University, or after his or her spouse completes his or her studies there, and does not intend and will not vote in another county within or without the state, in addition to Tuscaloosa County."

Upon submission for permanent injunction relief, Chief Judge Lynne dissolved the temporary injunction, denied the plaintiffs relief, and dismissed the action. Pursuant to Rule 52, Fed.R.Civ.P., Judge Lynne found the facts specifically as follows:

> "*Findings of Fact*
>
> "1. Prior to the filing of this suit the policy of the Board of Registrars of Tuscaloosa County, Alabama (the Board) was to register students who were, in the opinion of the Board, bona fide residents or domiciliaries of such county.

[1] See Code of Alabama, Recompiled 1958, Title 17, §§ 21, *et seg.*

"2. The Board has not denied student voter applications for the single reason that the applicants were students but has consistently required some evidence to support a mere statement of intent from which it might be inferred that the student applicant intended to reside in Tuscaloosa County permanently or for an indefinite period of time.

"3. During the period from January, 1966, to October 14, 1968, more than 500 students were registered by the Board; other applications, as to which there is no record evidence, were rejected. During this period the Board indiscriminately and even handedly applied certain standards in determining whether students would be registered. After ascertaining that the student had or had not been a registered voter of another county or state, the Board uniformly proceeded as follows:

(a) The Board upon determining that an applicant was a student or a wife of a student attempted to determine by oral examination whether or not he or she had resided in the State, County and Precinct for a sufficient length of time to enable him or her to register.

"(b) Then attempted to determine whether or not they would reside in Tuscaloosa County after the completion of his or her studies or the studies of her spouse, and accepted among other things as supporting evidence as his or her statement or of his or her intention to so remain, the following:

"(1) Whether or not such applicant had attained a residence of Tuscaloosa County prior to his or her entry in school.

"(2) Whether or not the applicant's parents resided in Tuscaloosa County.

"(3) Whether or not after the student had come to Tuscaloosa as a student he or she had dropped from school for a sufficient period of time to acquire a residence.

"(4) Whether or not such student owned property a home or a business.

"(5) Whether or not if employed, his employment was primary and school secondary.

"(6) Whether or not such student had applied for and had been accepted for a position in Tuscaloosa upon graduation.

"(7) Any other factor which tended to convince the Board of his or her intent to reside in Tuscaloosa either permanently or for an indefinite period of time.

"(8) Further that in determining the eligibility of a male student, the Board did not consider the domicile of the wife, but rather gave to the wife the domicile of her husband, except in the case where the wife had been an established resident of Tuscaloosa County prior to her marriage.

"4. Following the issuance of a temporary injunction by Judge Grooms on October 16, 1968, and a rule to show cause on November 4, 1968 it was agreed that until a final hearing on the merits the Board would register all students who had been physically present in Tuscaloosa County for the requisite statutory period and who would sign an oath that they intended to reside in Tuscaloosa County permanently or for an indefinite time. More students were registered in equivalent periods preceding such agreement than subsequent thereto."

As the Court's conclusions of Law, Judge Lynne adopted "the exceptional memorandum prepared by Robert L. Potts, Law Clerk."

Upon appeal the plaintiffs vigorously attack both the findings of fact and the conclusion of law of the district court, and insist that the defendants are denying to them the equal protection of the laws in violation of the Fourteenth Amendment.

If the interlocutory or permanent injunction sought by the plaintiffs were upon the ground of the unconstitutionality of any State statute, a district judge of three judges would be required under 28 U.S.C. § 2281, *et seq.*, and jurisdiction of this appeal would lie in the Supreme Court under 28 U.S.C. § 1253. Instead, however, the plaintiffs' ground for seeking an injunction is that the defendants have erroneously construed the applicable Alabama statute in a manner which denies the equal protection of the laws to the plaintiffs and the class they represent. As stated in the brief of plaintiffs-appellants, pages 11 and 12:

> "The Board raised *Ala. Code* tit. 17, §17 in defense of their practice. Plaintiffs' position was and is that the Board's construction of the statute is unconstitutional, and that its proper and constitutional construction would not permit the Board's practice. The statute reads:
>
> > "No person shall lose or acquire a residence either by temporary absence from his or her place of residence with out the intention of remaining, or by being a student of an institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence, or

> by being absent from his or her place of residence in the civil or military service of the state, or the United States; neither shall any soldier, sailor or marine, in the military or naval service of the United States, acquire a residence by being stationed in this state.

"In invalidating Texas' prohibition against servicemen's voting in *Carrington v. Rash*, 380 U.S. 89 (1965), the Supreme Court, referring specifically to this and similar provisions from other states, construed the clauses involving servicemen as not being absolutely determinative of residence, 380 U.S. at 92 n. 3.

"The annotations indicate that the Alabama appellate courts have not chosen between the Board's construction (a bar to or at least a strong presumption against registration of county non-native students) and that of plaintiffs (a saving feature for those students whose interest remains with their parental home)."

According to the plaintiffs' argument, a proper construction of Alabama Code, Title 17, § 17 will result in removing the restrictions imposed by the defendants on their rights to vote in Tuscaloosa County which they claim to be a denial of the equal protection of the law.

Decision of whether Judge Lynne's findings of fact are clearly erroneous in any part would be difficult. A decision on what restrictions or qualifications can be constitutionally imposed upon students and their spouses as a prerequisite to voting in the county in which the college or university is located would be an extremely difficult and uncertain task in the present state of development of the jurisprudence. The plaintiffs argue that the Supreme Court has developed a

particularly stringent application of the equal protection clause in voting cases, and that the state interest relied on to justify the restrictive classification must be "compelling," not merely "rational" or "legitimate," citing: *Cipriano v. City of Houma*, 1969, 395 U.S. 701; *Kramer v. Union Free School District*, 1969, 395 U.S. 621, 627-28; *Harper v. Virginia Board of Elections*, 1966, 383 U.S. 663, 670.

The most recent case on the subject, *Oregon v. Mitchell*, 1970 [400] U.S. [112], decided December 21, 1970, discloses that the Justices of the Supreme Court disagree among themselves as to whether the equal protection clause of the Fourteenth Amendment restricts the power of the States to set voter qualifications, and if so, the extent of such restrictions. Justice Harlan strongly supported his view that the "Fourteenth Amendment was never intended to restrict the authority of the states to allocate their political power as they see fit * * *." Justices Brennan, White and Marshall supported some of the views now advocated by the plaintiffs:

> "The right to vote has long been recognized as a 'fundamental political right, because preservative of all rights.' *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1866); see *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). 'Any unjustified discrimination in determining who may participate in political affairs undermines the legitimacy of representative government.' *Kramer v. Union Free School District*, 395 U.S., at 626. Consequently, when exclusions from the franchise are challenged as violating the Equal Protection Clause, judicial scrutiny is not confined to the question whether the exclusion may reasonably be thought to further a permissible interest of the State. Cf. *Metropolitan Co. v. Brownell*, 294

U.S. 580, 583-584 (1935). 'A more exacting standard obtains.' *Kramer v. Union Free School District*, 395 U.S., at 363. In such cases, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.' *Id.*, at 627; *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969)."

Justice Black was of the view that every distinction on account of race was forbidden, but that as to discriminations other than those on account of race, the rule was different:

"Above all else, the Framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race. *Loving v. Virginia*, 388 U.S. 1 (1967); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Slaughter House Cases*, 16 Wall. 36, 71-72 (1872). While this Court has recognized in some instances that the Equal Protection Clause of the Fourteenth Amendment protects against discrimination other than those on account of race, see *Reynolds v. Sims*, 377 U.S. 533 (1964); *Hadley v. Junior College District*, 397 U.S. 50 (1970); see also *Kotch v. Board of River Port Pilots*, 330 U.S. 552 (1947), the cases cited therein, it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and

> forbid every distinction, however trifling, on account of race."

None of the Justices disagreed with the following views eloquently expressed by Justice Black:

> "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county and municipal offices and the nature of their own machinery for filling local public offices. *Pope v. Williams*, 193 U.S. 621 (1904); *Minor v. Happersett*, 21 Wall. 162 (1874)."

In a matter of such importance to the States and their governments, a federal court should be slow to intervene, but should instead avoid needless conflict with the administration by the State of its own affairs. Cf. *Alabama Public Service Commission v. Southern Railway Co.*, 1951, 341 U.S. 341, 349, 350.

Neither the federal district court nor this Court should construe the State statute, for that would be a mere tentative answer which may be displaced tomorrow by a controlling State adjudication. *Railroad Commission v. Pullman Co.*, 1941, 312 U.S. 496, 500. Nor should the federal courts proceed to a premature and perhaps unnecessary constitutional adjudication. *Id.*

In short the federal district court, upon final submission, properly dissolved the temporary injunction; it should not, however, have proceeded to a decision on the merits as to permanent injunctive relief but should have abstained from further proceeding and retained jurisdiction until the State courts have authoritatively

construed the State statute or until efforts to obtain such an adjudication have been exhausted. *See government Employees v. Windsor*, 1957, 353 U.S. 364, 367. If the pltaintiffs then desire to proceed further in the federal district court, appropriate amendments to the pleadings should be permitted, and, if required, a three-judge district court may be convened. See 28 U.S.C. § 2281, *et seq.*

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1970

JAMES A. HARRIS, JR., *et al*,
Plaintiffs-Appellants,

versus

W. D. SAMUELS, JR., *et al.*,
Defendants-Appellees.

No. 29683
D. C. Docket
No. CA
68-598

Appeal from the United States District Court for the Northern District of Alabama.

Before RIVES, AINSWORTH and MORGAN,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Issued As Mandate: March 16, 1971

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JAMES A. HARRIS, JR., *et al.*
Plaintiffs-Appellants,

versus

W. D. SAMUELS, JR., *et al.*,
Defendants-Appellees.

No. 29683

Appeal from the United States District Court for the Northern District of Alabama.

(April 7, 1971)

ON PETITION FOR REHEARING

Before RIVES, AINSWORTH and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JAMES A. HARRIS, JR., *et al.*
Plaintiffs-Appellants,

versus

W. D. SAMUELS, JR., *et al.*,
Defendants-Appellees.

No. 29683

ON CONSIDERATION OF THE APPLICATION of the appellants in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of Sixty (60) days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within Sixty (60) days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition has been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of Sixty (60) days from the date of this order, unless the above mention certificate shall be filed with the clerk of this Court within that time.

/s/ RICHARD T. RIVES
United States Circuit Judge

Dated:

28 *USC — Supreme Court Rules* — Rule 19-1 (b)

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Title 17 — *Code of Alabama 1940* (Recomp. 1958) — Section 12

Every citizen of this state who is a citizen of the United States, and every resident of foreign birth, who, before the ratification of the present Constitution of the state, shall have legally declared his or her intention to become a citizen of the United States, twenty-one years old or upwards, not laboring under any of the disabilities named in section 15 of this title, and who shall have resided in this state at least one year, in the county six months, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and who shall have been duly registered as an elector, and shall

have paid, on or before the first day of February next preceding the date of the election at which he or she offers to vote, all poll taxes due from them for the next two preceding years, shall be an elector, and shall be entitled to vote at any election by the people.

Title 17 — *Code of Alabama 1940* (Recomp. 1958) — Section 17

No person shall lose or acquire a residence either by temporary absence from his or her place of residence without the intention of remaining, or by being a student of an institution of learning, or by navigating any of the waters of this state, the United States, or the high seas, without having acquired any other lawful residence, or by being absent from his or her place of residence in the civil or military service of the state, or the United States; neither shall any soldier, sailor or marine, in the military or naval service of the United States, acquire a residence by being stationed in this state.

Title 17 — *Code of Alabama 1940* (Recomp. 1958) — Section 31

The Board of Registrars shall have power to examine under oath or affirmation all applicants for registration and to take testimony touching the qualifications of such applicants, *****

Title 17 — *Code of Alabama 1940* (Recomp. 1958) — Section 33

Any person making application to the board of registrars for registration who fails to establish by evidence to the reasonable satisfaction

of the board of registrars that he or she is qualified to register, may be refused registration.

Title 17 — *Code of Alabama 1940* (Recomp. 1958) — Section 34

The action of a majority of the board of registrars shall be the action of the board, and a majority of the board shall constitute a quorum for the transaction of all business.

Title 17 — *Code of Alabama 1940* (Recomp. 1958) — Section 35

Any person to whom registration is denied shall have the right of appeal, without giving security for costs, within thirty days after such denial, by filing a petition in the circuit court at law or court of like jurisdiction held for the county in which he or she seeks to register, alleging that he or she is a citizen of the United States over the age of twenty-one years having the qualications as to residence prescribed in section 178 of the Constitution and entitled to register to vote under the provisions of the Constitution of Alabama, as amended. Upon the filing of the petition, the clerk of the court shall give notice thereof to the circuit solicitor authorized to represent the state in said county, who shall appear and defend against the petition on behalf of the state. The issues shall be tried in the same manner and under the same rules that other cases are tried in such court and by a jury, if the petitioner demands it. The registrars shall not be made parties and shall not be liable for costs. An appeal will lie to the supreme court in favor of the petitioner if taken within thirty days from the date of the judgment. Final judgment in favor of the petitioner shall entitle him or her to registration as of the date of his or her application to the registrars.

Title 17 — *Code of Alabama 1940* (Recomp. 1958) — Section 64-16(a)

(a) Any qualified elector of this state who is in service as a member of the armed forces of the United States, including the Alabama national guard, the United States naval reserves, the United States air force reserves, the United States military reserves, on active duty for training, whose regular duty requires that he be absent from the county of his residence on the date any primary, general, special, or municipal election is to be held, and any qualified elector who is the wife of any such elector in the armed services who resides with him at his duty station; or any qualified elector who is a disabled veteran confined in a facility or hospital operated by the veterans administration; or any qualified elector who is absent from the county because of his attendance at any university or college at which he is duly enrolled outside the county; or any qualified elector who is the spouse of such elector and at the time of voting actually resides with such elector, may vote in the election in the manner and under the regulations hereinafter prescribed.

Title 17 — *Code of Alabama 1940* (Recomp. 1958) — Section 64(23)

***

Any qualified elector who is absent from the county because of his attendance at any university or college at which he is duly enrolled outside the county, or any qualified elector who is the spouse of such elector and at the time of voting actually resides with such elector, may, not more than forty-five days nor less than five days before the election at which he desires to vote, make written application to the register, or to the person designated to serve instead of the register, for an absentee ballot. Such application shall contain or have attached thereto a

statement signed by the registrar of the university or college, or his qualified assistant, stating that such person is duly enrolled at such institution, or is the spouse of such person so enrolled at such institution. The voter may make the affidavit on the ballot before any officer authorized to administer oaths or before any officer of the university or college, and mail the ballot to the register, or other person acting instead. Such ballot shall be handled and counted in the same manner as ballots voted before the register in person.